No. 405

IN THE

Supreme Court of the United States

October Term, 1962

UNITED STATES OF AMERICA, Petitioner

v.

PIONEER AMERICAN INSURANCE COMPANY
AND
THE DEVELOPMENT COMPANY, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

Brief of Pioneer American Insurance Company and The Development Company, Inc.

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OPINIONS BELOW

The decree of the Chancery Court of Sebastian County, Arkansas, (R. 35-48) is not reported. The opinion of the Supreme Court of Arkansas (R. 72-77) is reported at 235 Ark. 267, 357 SW2d 653. The dissenting opinion of Chief Justice Harris appears in Appendix A of Petitioner's Brief, pp. 23-26.

JURISDICTION

The judgment of the Supreme Court of the State of Arkansas was entered on June 4, 1962 (R. 77-78). The petition for a writ of certiorari was filed on September 4, 1962, and was granted on November 19, 1962 (R. 78; 371 US 909, 9 L.Ed.2d 169). The jurisdiction of this Court rests on 28 USCA 1257(3).

QUESTION PRESENTED

Whether federal tax liens will be accorded priority over an attorney's fee contracted between mortgagor and mortgagee and provided for in a note and securing mortgage, when the mortgage is placed of record prior to the tax liens.

STATUTES INVOLVED

Sections 6321, 6322 and 6323 (a)(1), Title 26 USCA; and Sections 51-1002, 68-101, 68-102, and 68-910 of Arkansas Statutes (1947) Annotated. These sections are set forth in Appendix A.

STATEMENT

The original note in the amount of $20,000.00, and the real estate mortgage (deed of trust) securing same bear the date of May 24, 1956 (R. 7, 9). The mortgage describes real property located in Sebastian County, Arkansas (R. 10), and was filed for record on June 7, 1956 (R. 17).

The note, which is payable in monthly installments, includes the following provision concerning attorney's fee:

"The undersigned also agree(s) that in the event of default herein and of the placing of this note in the hands of an attorney for collection, or this note is collected through any court proceedings, to pay a reasonable attorney's fee." (R. 7.)

The mortgage includes the following provisions: "That if either the party of the second part (trustee) or the party of the first part (mortgagor) shall become a party to any suit or proceeding at law or in equity in reference to its interest in the premises herein conveyed, the reasonable costs, charges and attorney's fees in such suit or proceeding shall be added to the principal sum then owing by the party of the first part and shall be secured by this instrument, and the note secured hereby shall, at the option of the holder, become due and collectible." (R. 13.)

"The proceeds of any sale under this deed of trust shall be applied by the party of the second part as follows:

> "First: To pay the costs and expenses of executing this trust, and any and all sums expended on account of costs of litigation, attorney's fees, . . .
>
> "Third: To pay off the debt secured hereby, including accrued interest thereon, as well as any other sums owing to the party of the third part (mortgagee) or the party of the first part, pursuant to this instrument.
>
> "And last, to pay the balance, if any, to the

party of the first part . . ." (R. 14.) (Parenthetical explanations supplied.)

The taxpayers, Ocie A. Rogers and Florene W. Rogers, husband and wife, acquired the real property by a deed which was placed of record on March 18, 1958. Under the provisions of such deed, taxpayers, Rogers, took the property subject to the mortgage, and they assumed the obligations of the note and mortgage. (R. 38). Thereby they assumed the status of mortgagors under such mortgage.

By assignment, Respondent, Pioneer American Insurance Company acquired the status of mortgagee under such mortgage. (R. 18.)

Under date of March 4, 1958, taxpayers, Rogers, made a note and second mortgage in favor of Respondent, The Development Company, Inc. The second mortgage was placed of record on March 18, 1958. (R. 27-29.)

Taxpayers, Rogers, defaulted under the note and first mortgage in failing to make payments which fell due in October, 1960, and thereafter. (R. 60.) The United States filed Federal Tax Liens at various times between the dates of November 29, 1960, and October 3, 1961 (R. 64). On March 24, 1961, Pioneer American filed a suit to foreclose its mortgage, praying among other things for a reasonable attorney's fee as provided in its note. (R. 1-6.) Various interested parties filed pleadings in the suit to assert their claims, including The Development Company, Inc. (R. 22-29) and the

United States (R. 20, 34). The United States admitted that its liens for taxes were subordinate to the lien of the mortgagee as to principal and interest, but claimed its liens were superior to the lien of the mortgagee as to an attorney's fee. (R. 20-21.)

On November 15, 1961, the Chancery Court of Sebastian County, Arkansas, entered a decree of foreclosure (R. 35-48) which fixed an attorney's fee of $1,250.00. (R. 43, 45.) The decree included a finding that the mortgage lien of Pioneer American Insurance Company was a first lien, and prior to the lien of the United States, as to all amounts secured by such lien, including principal of the note and interest thereon, and attorney's fees. (R. 42.)

In accordance with the foreclosure decree, the mortgaged property was sold, and it brought a price sufficient, to pay, in accordance with the decree of the Chancery Court, the judgment in favor of Pioneer American Insurance Company, the judgment in favor of The Development Company, Inc., a judgment in favor of Alfred J. Anderson (who is not a party here), and a part of the Federal Tax Liens. Had the United States been accorded priority of its tax liens over the attorney's fee, the effect of such holding would have been to afford $1,250.00 additional to the United States to apply on the tax liens, and to deny such amount to Alfred J. Anderson and The Development Company, Inc., the third and second lienors respectively. (R. 49-55.) Distribution of available funds has been made, except for an amount requested by the United States to be retained in the Registry of the Court. (R. 52-55.)

The United States appealed to the Supreme Court of Arkansas, which affirmed the decree of the Chancery Court, Chief Justice Harris dissenting. (R. 72-78.)

SUMMARY OF ARGUMENT

The Government stakes its entire case on the "choateness" principle enunciated in the case of United States v. New Britain (1958) 347 US 81, 98 L.Ed. 520, 74 S.Ct. 367. If the choateness principle does not apply to this case, or, if under applicable authority Pioneer American Insurance Company's mortgage lien is choate as to the attorney's fee, the Government cannot prevail.

The mortgage lien in this case, which secured the attorney's fee among other things, was created by contract between the taxpayers and the mortgagee. The contract (mortgage) was placed of record long prior to the time any Federal Tax liens were filed.

This Court has not applied the "choateness" principle to mortgage liens or other liens protected by 26 USCA 6323(a). Prior cases before this Court have involved local taxes, landlord's liens, attachment, garnishment, or material or labor liens, where the lienor was attempting to impose a lien upon taxpayer's property; or, unrecorded assignments held under the particular facts to secure perfected or unperfected claims. The case of United States v. Buffalo Savings Bank, No. 96, this Term, decided January 27, 1963, was deemed by this Court to involve priority between local tax liens and the Federal Tax Lien, and not, as here, priority as between the Federal Tax Lien and a mortgage lien created by contract and properly placed of record.

The choateness principle should not be applied in this case. Other litigants who have been before this Court would have to qualify as judgment creditors in order to obtain the protection of 26 USCA 6323(a). Even the Buffalo Savings Bank case was treated as a contest between a local government and the United States, and not as a mortgagee situation. This case, however, does involve a true mortgagee situation. Pioneer American Life Insurance Company should have reasonable freedom to contract as a mortgagee for obligations on the part of the mortgagor designed to protect the mortgagee's security, whether or not the mortgagor's obligations are susceptible to being defined as "choate" or "inchoate." Under Arkansas law the **entire mortgage** is a lien on the mortgaged property, and it is not required that the mortgage set forth the amount of the debt nor how it is evidenced. Furthermore, Arkansas law authorizes a provision for an attorney's fee such as here involved.

In the event the Court does apply the choateness principle to this case, the mortgage lien and the part thereof representing an attorney's fee is choate under Arkansas law and under the case of Security Mortgage Company v. Powers (1928) 278 US 149, 73 L.Ed. 236, 49 S.Ct. 84. Attorneys' fees are as choate as principal, interest, court costs, the commissioner's fee or the receiver's fee. The Government concedes principal and interest are prior. It raised no objections that court costs, a commissioner's fee and a receiver's fee were allowed by the trial court as items prior to the tax lien.

There should be employed in this case a standard

which has been sanctioned by this Court in recent cases, namely whether taxpayers have any interest under state law to which the Federal Tax Lien can attach. United States v. Bess (1958) 357 US 51, 2 L.Ed.2d 1135, 78 S.Ct. 1054; Aquilino v. United States (1960) 363 US 509, 4 L.Ed.2d 1365, 80 S.Ct. 1277; United States v. Durham Lumber Company (1960) 363 US 522, 4 L.Ed. 2d 1371, 80 S.Ct. 1282. Taxpayers, Rogers, having defaulted under the mortgage, can realize from the mortgaged real property only what is left after the foreclosure sale and payment of amounts secured by the mortgage, including the attorney's fee.

The legislative history of 26 USCA 6323 shows this Section was enacted in order to facilitate business transactions, and to put the Government in the same position as the individual with reference to liens on property. Neither of these purposes will be realized if the priorities contended for by the Government are given effect.

The substance of the relief requested by the Government is to take $1250 away from respondents who are prior lienors, and apply such amount in payment of taxes for which respondents have no liability, owed by taxpayers over whom respondents have no control. In equity and good conscience this should not be done, and if it is done the Government will be unjustly enriched.

ARGUMENT

I. THE "CHOATENESS" PRINCIPLE HAS NOT BEEN APPLIED BY THIS COURT TO MORTGAGEES, NOR TO THE OTHER PROTECTED CATEGORIES NAMED IN 26 USCA 6323(a).

The keystone of the Petitioner's case appears on Page 9 of its Brief, where it is stated that the Federal tax lien cannot be defeated by a prior state-created lien unless the latter is choate. Petitioner's argument assumes this is true as to **any** state-created lien, but its citations in Footnote 5 on Page 9 of its Brief do not support this assumption.

26 USCA 6323(a) says the Federal tax lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor, until proper recordation of the Federal tax lien. By the enactment of this provision, two classes of local liens were set up: (1) those protected under the provisions of 26 USCA 6323 (a); and (2) other local liens, not so protected. Among the latter class will be found numerous local liens which have not been reduced to judgment, such as local tax liens, attachment and garnishment liens, material and labor liens, and landlord's liens.

Since the Government stakes its case on the decisions cited in Footnote 5, Page 9 of its Brief, it becomes important to inquire as to what type of local lien is involved in each of the cited cases. Where a case involves a lien in one of the protected categories under 26 USCA 6323(a), the important inquiry is, was the "choateness" principle applied?

In the earlier cases, involving priority of debts owed to the United States by an insolvent debtor, the choateness principle was applied to local taxes and to a landlord's lien.[1] Later, when the question was priority as between the Federal tax lien and a local lien, most of the local liens in cases coming before this Court were claimed in connection with attachment, garnishment, the furnishing of labor or material, or the lienor's status as a landlord.[2] The case of United States v. Ball Construction Company (1957) 355 US 587, 2 L.Ed.2d 510, 78 S.Ct. 442, reversing 239 F2d 384, and Crest Finance Company v. United States (1961) 368 US 347, 7 L.Ed. 2d 342, 82 SCT 384, involved unrecorded assignments.

The only cases cited by Petitioner in its Footnote 5 where recorded mortgages were a significant part of the facts were the cases of United States v. New Britain

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[1]Spokane County v. United States (1928) 279 US 80, 73 L.Ed. 621, 49 SCt 321; New York v. Maclay (1932) 288 US 290, 77 L.Ed. 754, 53 SCt 323; United States v. Waddill (1944) 323 US 353, 89 L.Ed. 294, 65 SCt 304; Illinois v. Campbell (1946) 329 US 362, 91 L.Ed. 348, 67 SCt 340.

[2]United States v. Security Trust & Savings Bank (1950) 340 US 47, 95 L.Ed. 53, 71 SCt 111; United States v. Acri (1954) 348 US 211, 99 L.Ed. 264, 75 SCt 239; United States v. Liverpool & London Insurance Co. (1954) 348 US 215, 99 L.Ed. 268, 75 SCt 247; United States v. Scovill (1954) 348 US 218, 99 L.Ed. 271, 75 SCt 244; United States v. Colotta (1955) 350 US 808, 100 L.Ed. 725, 76 SCt 82, reversing per curiam 224 Miss 33, 79 S2d 474; United States v. White Bear Brewing Co. (1956) 350 US 1010, 100 L.Ed. 871, 76 SCt 646; United States v. Vorreiter (1957) 355 US 15, 2 L.Ed.2d 23, 78 SCt 19, reversing per curiam 134 Colo 543 307 P2d 475; United States v. Hulley (1958) 358 US 66, 3 L.Ed.2d 106, 79 SCt 117, reversing per curiam 102 S2d 599 (Fla.)

(1958) 347 US 81, 98 L.Ed. 520, 74 SCt 367; and United States v. Buffalo Savings Bank, No. 96, this Term, decided January 7, 1963, 9 L.Ed.2d 283.[3]

Petitioner in its Brief takes the position that under the New Britain case, a mortgage lien which is prior in time must be choate at the time the Federal tax lien is filed in order to have priority over the Federal tax lien. The New Britain case does not support the Government's contention. That case was a direct contest between a local government and the United States, involving priority of their respective liens. The mortgagee was not a party and therefore was making no claim

[3]Most of the cases decided by courts other than this Court, cited on Page 12 of the Government's Brief as holding that the Federal tax lien has priority over a lien for attorney's fee, are distinguishable from this case. In United States v. Bond (CA4 1960), 279 F2d 837, certiorari denied (1960) 364 US 895, 5 L.Ed.2d 189, 81 SCt 220, which was a suit brought by the United States to foreclose its tax lien, there was no provision in the note or mortgage for the attorney's fee as here. In re New Haven Clock & Watch Company (CA2 1958), 253 F2d 577, was a proceeding for reorganization under the Bankruptcy Act. The record on appeal was incomplete concerning the attorney's fee and the case was remanded to the lower court, therefore the opinion was dictum so far as it dealt with the attorney's fee. United States v. Ringler (ND Ohio 1958), 166 FSupp 544 involved legal services not incident to foreclosure, but separately rendered by the mortgagee to the mortgagor. First State Bank of Medford v. United States (DC Minn 1958), 166 FSupp 204 involved an unrecorded assignment and a claim for an attorney's fee by an attorney who rendered services for the mortgagor, and not fees incident to foreclosure. In American Surety Company of New York v. Sundberg (SC Wash 1961), 58 Wash2d 337, 363 P2d 99, certiorari denied 368 US 989, 7 L.Ed.2d 526, 82 SCt 598, there was no provision in the mortgage for an attorney's fee.

before this Court in connection with its rights under the note and mortgage.

The Government argued in the New Britain case that, except as Congress has provided otherwise, the Federal tax lien was paramount to State-created liens; and that the only exceptions Congress had seen fit to allow are those specifically set out in 26 USCA 6323(a) (Section 3672 of the Internal Revenue Code of 1939), which protects mortgagees, pledgees, purchasers and judgment creditors. The Court agreed with this argument:

> "There is nothing in the language of Section 3672 to show that Congress intended antecedent Federal tax liens to rank behind **any but the specific categories of interests set out therein,** and the legislative history lends support to this impression." United States v. New Britain (1958) 347 US 81, 98 L.Ed. 520, 527, 74 SCt 367. (Emphasis supplied.)

As authority for this statement, the Court cited Mr. Justice Jackson's concurring opinion in the Security Trust & Savings Bank case, where it was held that the state lien was not that of a "judgment creditor" within the meaning of Section 6323(a). In other words, the New Britain case (and also the Security Trust & Savings Bank case) recognized the two classes of local liens, holding that the local lien would either have to be choate, or else within the provisions of Section 6323(a), in order to be prior to the Federal lien.

Like the New Britain case, the Buffalo Savings

Bank case involved a recorded mortgage as a significant part of the facts. Unlike the New Britain case, the mortgagee was a party in the Buffalo Savings Bank case. However, such mortgagee's rights were not protected by contract as in the case at bar. In event of default under the Buffalo Savings Bank mortgage, the mortgagee was "empowered to sell the mortgaged premises according to law." Brief of Buffalo Savings Bank in United States v. Buffalo Savings Bank, Page 6. Under statutes of the State of New York and the trial Court's decree, the referee who was appointed to sell the foreclosed property had authority to pay out of the proceeds of the sale local sales taxes which were liens upon the property sold, and to charge such payments as expenses of the sale. This Court treated the priority question in the same manner as in the New Britain case, namely as a direct contest between local taxing authorities and the United States, adding that "**the state** may not avoid the priority rules of the Federal tax lien by the formalistic device of characterizing subsequently accruing local liens as expenses of sale." (Emphasis supplied.) United State v. Buffalo Savings Bank, No. 96, this Term, decided January 7, 1963, 9 L.Ed.2d 283.

The case at bar is different from the cases cited by Petitioner in its Footnote 5, and from other cases decided by this Court involving priority of the Federal tax lien, in that the mortgagee's rights have been specified by contract with the taxpayer, and notice of such contract was made a matter of record long prior to the filing for record of the tax lien of the United States. In the note between the original mortgagor and mort-

gagee, the mortgagor agreed "that in the event of default herein and of the placing of this note in the hands of an attorney for collection, or this note is collected through any court proceedings, to pay a reasonable attorney's fee." (R. 7.) In the recorded mortgage it was provided that in event of litigation involving the interest of the mortgagor or the trustee, ". . . . attorney's fees in such suit or proceeding shall be added to the principal sum then owing by the party of the first part and shall be secured by this instrument . . ." (R. 13.) (In the Record as originally printed, the word "by" erroneously appears as "to.") Also, it is specifically agreed under the mortgage (deed of trust) that in event of a foreclosure sale, the proceeds of the sale " . . . shall be applied by the party of the second part . . . to pay . . . attorney's fees . . . with interest thereon." (R. 14.) The mortgage which, together with the note it secured, constituted the contract between the mortgagor and mortgagee, was placed of record on June 7, 1956 (R. 17). The taxpayers, Ocie A. Rogers and Florene W. Rogers, assumed the obligations of the mortgagor and became bound on the mortgage of record on March 4, 1958 (R. 60). The first tax lien was filed on November 20, 1960 (R. 64).

Except for the two unrecorded assignment cases and the Bufaflo Savings Bank case, the cases cited by Petitioner in its Footnote 5 involved adverse situations between the lienor and the taxpayer. The lienor in those cases was trying to impose or enforce the lien, as contrasted with this case, where the mortgage lien was contracted by the taxpayers.

In one of the unrecorded assignment cases, United States v. Ball Construction Company, this Court held in a 5 to 4 decision that under the facts of that case the claim of the assignee was unperfected and therefore must yield to the Federal tax lien. In the other unrecorded assignment case, however, namely Crest Finance Company v. United States, the claim of the assignee was conceded by the Solicitor General to be choate, and the decision was for the taxpayer.

The difference between this case and the Buffalo Savings Bank case is that there is here involved a contract right in favor of the mortgagee, rather than a local tax lien as in the Buffalo Savings Bank case; and in this case there are mandatory provisions in the contract requiring the mortgagor to pay the mortgagee's attorney fee in event of foreclosure, whereas the contract as well as the applicable state law were in permissive terms in the Buffalo Savings Bank case.

II. THE "CHOATENESS" PRINCIPLE SHOULD NOT BE EXTENDED TO LIENS OF MORTGAGEES AND TO THE OTHER PROTECTED CATEGORIES NAMED IN 26 USCA 6323(a).

Prior to the case at bar, this Court has not considered the question of priority as between the Federal tax lien and an attorney's fee which is clearly a component part of the mortgage lien.

In the cases cited by Petitioner in its Footnote 5, local lienors would have been entitled to the protection of 26 USCA 6323(a), if at all, as judgment creditors.

The court held that these lienors had not completed proceedings sufficient to establish their liens within the protected category of judgment creditors. Under the facts of the Buffalo Savings Bank case, the court treated it as a contest between a local government and the United States.

This case in the first case where a true mortgagee situation is before the Court in the sense that the claim for priority is a matter of contract between the mortgagor and the mortgagee, and cannot be classified as a claim of a local government for taxes, of one who sues out an attachment, or any of the other classes of local lien claimants in the cases cited in Footnote 5 of Petitioner's Brief.

Respondent Pioneer American Insurance Company, as well as all other mortgagees in the same situation, should have reasonable freedom to contract as a mortgagee for obligations on the part of the mortgagor designed to protect the mortgagee's security, whether or not the mortgagor's obligations are susceptible to being defined as "choate" or "inchoate." If the choateness test is applied to the contract obligations between the mortgagor and the mortgagee, and if this Court finds that the obligations of the mortgagor do not meet the choateness test, Respondent Pioneer American and all other mortgagees will be placed in a situation such that it will be impossible for them to contract voluntarily with a mortgagor in a manner that will adequately protect them against loss in event of foreclosure.

In Arkansas, the statute which gives effect to the

mortgage lien defines the lien in terms of the mortgage itself, and not in terms of principal, interest, or other component parts of the mortgage.

> "51-1002. Lien Attaches When Recorded.—Every mortgage of real estate shall be a lien on the mortgaged property from the time the same is filed in the recorder's office for record, and not before; which filing shall be notice to all persons of the existence of such mortgage." Arkansas Statutes (1947) Annotated, 51-1002.
>
> (This Section was amended by the Uniform Commercial Code, Act No. 185 of the Acts of Arkansas, 1961, Section 10-102, to the extent of deleting personal property from the Section as previously written.)

By decision it is the rule in Arkansas that even if the mortgage does not set forth the amount of the debt and the manner in which such debt is evidenced, the mortgage security is not necessarily invalidated.

> "If the mortgage contains a general description, sufficient to embrace the liability intended to be secured and to put a person examining the records upon inquiry, and to direct him to the proper source for more minute and particular information of the amount of the incumbrance, it is all that fair dealing and the authorities demand." Curtis & Lane v. Flinn, Trustee (1885) 46 Ark. 70, 72.

See also Bank of Dyer v. Cole (1923), 157 Ark. 583, 586, 249 SW 32.

Furthermore, attorney's fees such as involved in this case have been specifically approved by the General Assembly and the Supreme Court of Arkansas. Arkansas Statutes (1957) Annotated 68-910 (Act 350 of the Acts of Arkansas 1951) authorizes a provision in a note for payment of reasonable attorneys' fees, not to exceed 10% of the amount of principal due, plus accrued interest. This statute has been upheld, as to its constitutionality and otherwise, in a contested foreclosure case. Holloway v. Pocahontas Federal Savings & Loan Association (1959) 230 Ark. 310, 323 SW2d 204. The Arkansas Supreme Court observed that under this statute, the parties to a note are permitted to make a voluntary agreement for a reasonable attorney's fee for the creditor. 323 SW2d at 206.

In its brief the Government speaks of the portion of the lien representing attorneys' fees as if it were a seporate lien in this case, but it is not. It is a part of the mortgage lien, which is conceded to be prior as to the principal mortgage debt, interest thereon, and apparently, court costs. It would not be proper to speak of an "interest lien" or a "court costs lien," and it is not proper to refer to a "lien for attorneys' fee" where the attorney's fee is an incident of the mortgage the same as interest and court costs.

Despite the concessions the Government has made as to the choateness of interest and court costs, neither these items nor attorneys' fees are of a nature such that their amounts will be established (as the Government claims is necessary under the choateness concept) at the time the Federal tax lien arises. The mortgagee's rights

should not be subjected to a separate and unrealistic test as to one component part of his mortgage lien—he should recover what he has contracted for.

Because of the attributes of Respondent Pioneer American's status as a mortgagee, and especially the fact that its contract with taxpayers Rogers reflects a business transaction designed to afford reasonable protection to Pioneer American's mortgage security, such contract having been voluntarily entered into and placed of record long before the first United States tax lien was recorded, the choateness principle should not be applied to this case.

III. IN EVENT THE COURT DOES APPLY THE CHOATENESS PRINCIPLE TO THE CASE AT BAR, THE MORTGAGE LIEN FOR ATTORNEY'S FEES IS CHOATE UNDER ARKANSAS LAW AND DECISIONS OF THIS COURT.

On Page 10 of Petitioner's Brief, the New Britain case is quoted to the effect that in order for a state-created lien to be "choate" in the Federal sense, the identity of the lienor and the property subject to the lien must be known, and the amount of the lien must be established. There is no question in this case as to the identity of the lienor and the property subject to the lien. The only consideration important to choateness as defined in the cases cited by the Petitioner is whether the amount of the lien has been established in accordance with such cases.

The face amount of the mortgage lien was

$20,000.00 (R. 7), but at any given time, such as on November 29, 1960, when the first Federal tax lien was filed (R. 64), the principal debt might be an entirely different amount due to payments in the meantime, and such payments might cause the principal debt to be changed any number of times. In like manner, interest might change due to reduction of principal, accumulation of interest on unpaid installments, or additional interest provided by the terms of the note on delinquent payments. (R. 7.) Petitioner admitted at the trial that principal and interest of Pioneer American's debt were entitled to priority over the Federal tax lien (R. 66, 67), despite these uncertainties, which might cause the total amount of principal or interest due under the mortgage to be either greater or less that what was due at the time the Federal tax lien was filed.

Certain other items in connection with Pioneer American's mortgage lien appear also to have been conceded by the Petitioner to be prior to the Federal tax lien, although they arose after the tax liens were filed. These include court costs of $257.55 (R. 46, 51, 54), including a commissioner's fee for making the foreclosure sale in the amount of $35.00 (R. 50, 51, 53); and a fee for the receiver in the amount of $175.00 (R. 45).

The total amount of Pioneer American's judgment, including interest and attorney's fees, was $18,689.87 (R. 43, 45) which was less than the record amount of $20,000.00 for which Pioneer American had taken its mortgage (R. 7).

So far as the attorney's fee was concerned, it was

stated in the note to be for a reasonable amount (R. 7), but the amount was further limited by the provisions of Arkansas Statutes (1947) Annotated, 68-910 to ten per cent of the amount of the principal due, plus accrued interest. The maximum amount of the attorney's fee, being a percentage of principal and accrued interest, could be determined as easily as the principal and interest themselves, which are conceded to have priority. The amount of the attorney's fee was uncertain or inchoate only in the same sense as was the principal and interest, namely that events after the filing of the tax liens might cause the attorney's fee either to be more due to accumulations of interest, or less due to payment of principal or interest, or action by the court in setting the attorney's fee at less than the maximum statutory allowance.

The Supreme Court of Arkansas has specifically held that the rights to the attorney's fee became choate prior to the time the Federal tax lien was filed, due to the recording of the mortgage in 1956 setting out that an attorney's fee would be added in event of default, and the fact that there was a default prior to the filing of the Federal tax lien, making the provision for an attorney's fee enforceable under the Arkansas law as a contract of indemnity (R. 75, 76). The Arkansas Court has also relied upon Arkansas Statutes (1947) Annotated 68-102, which is a part of the Negotiable Instruments Law and which provides in part: "The sum payable is a sum certain . . . altrough it is to be paid: . . . (5) with costs of collection or an attorney's fee in case payment shall not be made at maturity." (R. 74.)

The effect of the Arkansas Supreme Court's citation of Arkansas Statutes (1947) Annotated 68-102 is that the attorney's fee becomes a part of the principal debt, as further provided in the mortgage. (R. 13.) This is in accordance with the Arkansas decisions, which have construed liberally the scope of the mortgage lien. The entire mortgage is considered in ascertaining the intention of the parties as to whether the mortgage secures an indebtedness other than the note specifically described therein. Jones v. Dowell (1928) 176 Ark. 986, 989, 4 SW2d 949.

Petitioner maintains on Page 13 of its Brief that the case of Security Mortgage Company v. Powers (1928) 278 US 149, 73 L.Ed. 236, 49 SCt 84, does not indicate that the attorney's fees became choate prior to the perfection of the Federal tax liens in this case. It is said that this is so because, among other things, the Powers case did not involve the priority of a Federal tax lien.

The importance of the Power case is not in the fact of whether it did or did not involve a Federal tax lien, but in the fact that in order for this Court to arrive at a decision in the case it was necessary to consider the true nature of a provision in a mortgage for attorneys' fees.

The Court observed in the Powers case that under the applicable section of the Bankruptcy Act the trustee took the property of the bankrupt "subject to valid liens existing at the time of the institution of the bankruptcy proceedings." 278 US at 153. Certain real estate owned by the bankrupt was subject to a mortgage in favor of Security Mortgage Company. The

notes secured by the mortgage contained a provision for all costs of collection, including ten per cent as attorney's fees. The notes had not been defaulted prior to the adjudication of bankruptcy.

The trustee in bankruptcy procured an order to sell the mortgaged property free of liens, and at the sale Security Mortgage Company was the purchaser, for a price in excess of all liens. Security asked to be allowed as a credit against the purchase price the sum of $9,442.40 for attorney's fees. The argument of the trustee was that since there had been no default on the notes at the time of the bankruptcy adjudication, the liability for attorneys' fees was contingent and not proveable under the Bankruptcy Act. This Court, however, characterized the lien for attorney's fees as "not inchoate" and "perfect when the principal note and the loan deed securing it were given," 278 US at 156.

Petitioner contends that the attorney's fees in the case at bar should be denied priority because of being inchoate, yet in the Powers case, where the important facts concerning the provisions for the attorney's fee were substantially similar to the facts of the case at bar, this Court specifically found that the lien of the mortgage was not inchoate. The importance of the Powers case cannot be diminished by Petitioner's reference to the "long line of subsequent decisions in which this Court held that a state-created lien is not choate" (Page 14 of Petitioner's Brief), for the reason that such subsequent decisions, as aforesaid, have not dealt with mortgage liens comparable to the mortgage lien in the Powers case and in the case at bar.

Not infrequently in the field of tax law it becomes necessary to examine the true nature of property interests under non-tax law in order to ascertain how the tax law applies. So it is here, the Powers case holding that a provision in a mortgage for an attorney's fee makes the mortgage lien, so far as the attorney's fee is concerned, "not inchoate," but "perfect." Being perfect and specific, the priority of the attorney's fee over the Federal tax lien should be recognized, along with the other components of the mortgage debt including principal and interest.

IV. THERE SHOULD BE EMPLOYED IN THIS CASE A STANDARD WHICH HAS BEEN SANCTIONED BY THIS COURT IN RECENT CASES, NAMELY WHETHER TAXPAYERS HAVE ANY INTEREST UNDER STATE LAW TO WHICH THE FEDERAL TAX LIEN CAN ATTACH.

In 1958, there came before this Court the case of United States v. Bess (1958) 357 US 51, 2 L.Ed.2d 1135, 78 SCt 1054, in which the Federal tax liens had been perfected against the property of Mr. Bess prior to his death on June 29, 1950. After the assets of Mr. Bess' estate were applied to payment of the tax liens, a total of approximately $8,800.00 remained unpaid. Mr. Bess had carried insurance on his life in a total amount of approximately $63,500.00, and the cash surrender value of the policies at his death was about $3,300.00. During his life he had retained ownership rights in the policies, including the right to change the beneficiary, to bor-

row against the cash surrender value and to assign the policies. The Government contended that the entire proceeds of the life insurance policies should be available to pay the tax liens, but this Court, following New Jersey law, held that Mrs. Bess, the beneficiary of the policies, was liable as a transferee only to the extent of the cash surrender value of the policies. The place of state law in this situation was stated to be as follows:

> "Since Section 3670 (now 6321) creates no property rights, but merely attaches consequences, federally defined, to rights created under state law, ... we must look first to Mr. Bess' right in the policies as defined by state law.
>
> "... Once it has been determined that state law creates sufficient interest in the insured to satisfy the requirements of Section 3670, state law is inoperative to prevent the attachment of liens created by federal statutes in favor of the United States. ..." 2 L.Ed.2d 1134, 1141. (Parenthetical explanation supplied.)

In 1960 two cases came before this Court in both of which the Federal Government was claiming a sum of money under its tax lien, and sub-contractors were claiming the same money under provisions of local law. These cases were Aquilino v. United States (1960) 363 US 509, 4 L.Ed.2d 1365, 80 SCt 1277, and United States v. Durham Lumber Company (1960) 363 US 522, 4 L.Ed.2d 1371, 80 SCt 1282. In the Aquilino case which arose in the New York State Courts, the petitioning sub-contractors did their work in August and September of

1962, and in November of that year they filed notices of their mechanic's liens, and later sued to foreclose those liens. The Government filed its notice of Federal tax lien during October of 1962. Approximately $2,200.00 owed by the owner of the property under the general contract to the general contractor (taxpayer) was deposited in Court pending decision of the competing claims between subcontractors. The contention of the subcontractors was that since the general contractor (taxpayer) owed them more than the $2,200.00 for labor and materials supplied to the job under the New York Lien Law, the general contractor had no interest in the $2,200.00. This Court, reversing the New York Court of Appeals, remanded the case for a determination as to whether or not the taxpayer had an interest in the $2,200.00 fund. In its opinion, this Court said the important question was not only whether the general contractor had any property under local law, but also the extent of such property:

> "The threshold question in this case, as in all cases where the Federal government asserts its tax lien, is whether and to what extent the taxpayer has 'property' or 'rights to property' to which the tax lien could attach. In answering that question, both Federal and State Courts must look to state law, for it has long been the rule that 'in the application of a Federal revenue act, state law controls in determining the nature of the legal interest which the taxpayer had in the property . . . sought to be reached by the statute.' . . . Thus, as we held only two Terms ago, Section 3670 'creates no property

rights but merely attaches consequences, federally defined, to rights created under state law...' (citing the Bess case)... However, once the tax lien has attached to the taxpayer's state-created interest, we enter the province of Federal law, which we have consistently held determines the priority of competing liens asserted against the taxpayers' 'property' or 'rights to property' (citing cases, including many of those cited by Petitioner in Footnote 5 of its Brief)..." 4 L.Ed.2d 1365, 1368-1369. (Parenthetical explanations supplied.)

On remand, the New York Court of Appeals concluded:

"...as a matter of New York law, a contractor does not have a sufficient beneficial interest in the moneys, due or to become due from the owner under the contract, to give him a property right in them, **except insofar as there is a balance remaining after all subcontractors and other statutory beneficiaries have been paid.**" Aquilino v. United States (1961) 10 NY2d 271, 282, 219 NYS2d 254, 176 NE2d 826. (Emphasis supplied.)

In the Durham Lumber Company case, which arose in the Bankruptcy Court, the owners of the property owned under the construction contract the sum of $5,250.00 to the general contractor, who was also the taxpayer and the bankrupt. This $5,250.00 was paid to the trustee in bankruptcy, and it was claimed on the one hand by subcontractors who had not been paid by the

general contractor-taxpayer-bankrupt, and on the other by the Federal Government as a result of its tax liens. The taxes had been assessed in August and November of 1954. The subcontractors had completed their work during July of 1954, and had given the owners of the property notice of their claims in January and February of 1955. The taxpayer-general contractor was adjudicated bankrupt on January 18, 1955.

The Court of Appeals below had stated that the nature and extent of the general contractor's property rights, to which the tax lien attached, must be ascertained under state law, and it had found that under North Carolina law, the property right of the general contractor subject to seizure under the tax lien was the excess, if any there was, of the claim of the general contractor over the claims of the subcontractors. This Court stated that the Court of Appeals was correct in asserting that the Government's tax lien attached to the taxpayer's property interests in the fund as defined by North Carolina law. This Court accepted the interpretation of North Carolina law by the Court of Appeals which was deemed to be skilled in the law of that state and it was indicated by this Court that if the Courts of North Carolina had interpreted the local law which was involved in the case, such interpretation would have been accepted in reaching a decision as to the property rights of the taxpayer. 4 L.Ed.2d at 1374.

Mr. Justice Harlan and Mr. Justice Black dissented in both the Aquilino and Durham Lumber Company cases, stating among other things that they could not be distinguished from a line of cases dealing with priority

of Federal tax liens, most of which are cited in Footnote 5 of Petitioner's Brief. 4 L.Ed.2d at 1375 and 1376.

Do the taxpayers here, Ocie A. Rogers and Florene W. Rogers, have any property rights to which the Federal tax liens can attach? We submit that they do not, until provision is made for all prior mortgage liens including the attorney's fee as provided in the first mortgage. Their position is that of mortgagors (they are assignees of the original mortgagor). Their predecessors executed a conveyance (deed of trust) with covenants of warranty in favor of the mortgagee, Republic Mortgage Company, Inc., which assigned to Respondent, Pioneer American Insurance Company. The conveyance is on condition that the promissory note secured by the mortgage will be timely and fully paid, and that all other terms and provisions of the mortgage will be complied with, including payment of the attorney's fee provided for in the note and mortgage. In event of default under the mortgage followed by foreclosure and sale, proceeds of the sale are to be applied to the items secured by the mortgage, including the debt, interest thereon, and attorney's fees. (R. 14.) Only after all of this is done, or else the debt and interest have been paid without default, is it possible to define the extent of Mr. and Mrs. Rogers' property or rights to property in the real estate or its proceeds.

Under Arkansas law the legal title to lands included in a mortgage or deed of trust passes to the mortgagee or the trustee for the purpose of making the security available in payment of the debt. Foreman v. Holloway & Son (1916) 122 Ark 341, 344, 183 SW 763, Hughes,

Arkansas Mortgages (1930), p. 5, Secs. 4, 5. Here the debt includes the attorney's fee. The trustee under the deed of trust (R. 9), and not taxpayers Rogers, has legal title to the real estate for the purpose of making it available for payment of the entire mortgage debt, including the attorney's fee.

As in the Aquilino case, where on remand it was held by the New York Court of Appeals that a contractor did not have a property right in money due him by an owner, except after payment of subcontractors and other statutory beneficiaries; so here, taxpayers Rogers have no property right in moneys due from proceeds of a foreclosure sale, except after payment of the principal of the mortgage debt and the other items secured by the mortgage including interest and the attorney's fee.

The Government seems to concede that under Arkansas law and apart from the choateness concept, the attorney's fee is entitled to first priority as a part of Pioneer American's first mortgage (Page 5 of Petitioner's Brief). Under the terms of the mortgage and provisions of Arkansas law, taxpayers Rogers cannot relieve themselves of the obligation for the attorney's fees except by prompt payment of the obligation, or else after default by payment of same from the proceeds of the foreclosure sale. Since they have defaulted, it is clear under state law that the attorney's fee must be paid from the proceeds of the foreclosure sale so long as there are any funds left with which the fee may be paid —this would be true even if the Government liens were paid before the attorney's fee. Therefore the property

or property rights of taxpayers Rogers in the real estate or its proceeds can only be what is left after payment of the amounts secured by the mortgage, including the attorney's fee.

V. THE LEGISLATIVE INTENTION WILL BEST BE CARRIED OUT IF THE ATTORNEY'S FEE IS ACCORDED FIRST MORTGAGE PRIORITY.

26 USCA 6321 provides for the basic Federal tax lien, stating that when one neglects or refuses to pay a tax after demand, such tax, including interest, penalties and certain other additions, shall be a lien in favor of the United States upon all property and rights to property of the taxpayer.

A similar provision has been a part of our law since 1866. 14 Stat. at L. 98, 107, Chapter 184. The priority of a Federal tax lien under this basic provision was, from the first, governed by the doctrine of "first in time is first in right." Detroit Bank v. United States (1942) 317 US 329, 334, 87 L.Ed. 304, 63 SCt 297. Accordingly, a valid mortgage placed of record before demand was made for the tax (or before assessment, 26 USCA 6322), would be given priority over the Federal tax lien; but if the Federal tax lien arose first it was prior, even if it was not recorded.

What is now 26 USCA 6323 (Section 3672 of the Internal Revenue Code of 1939) was first enacted in 1913, providing that the Federal tax lien shall not be valid against any mortgagee, pledgee, purchaser or judg-

ment creditor until notice has been filed in the appropriate office designated by the law of the state or territory. The House Report accompanying the proposed amendment was H. R. Rep. No. 1018, 62nd Congress, 2nd Session. See concurring opinion of Mr. Justice Jackson, United States v. Security Trust & Savings Bank, 71 SCt. at 114. The Report read in part as follows:

> "The lien (under the law prior to the 1913 amendment) is so comprehensive that it covers all the property and rights to property of the delinquent situated anywhere in the United States, and any person taking title to real estate is subject to the impossible task of ascertaining whether any person, who has at any time owned the real estate in question, has been delinquent in the payment of the taxes referred to while the owner of the real estate in question. The business carried on under the Internal-Revenue law may be at a great distance from the property affected by this secret lien, but this will not relieve the property from the lien.
>
> "The recent Act relating to excise tax by corporations makes it imperative that some legislation of this kind be enacted in order to protect the transfer of property, and to facilitate business transactions. There is no reason why the government should not occupy the same position with reference to liens on property as does the individual.
>
> "It is believed that the states will very readily pass legislation authorizing the filing of notice in the

> office of the registrar or recorder of deeds, in order to protect its citizens in business transactions against liens which the citizens cannot know of except at great cost of money and time. This law simply gives the states the opportunity to do so if it wishes to save its citizens fro mthis unnecessary burden." House of Representatives Report No. 1018, 62nd Congress, Second Session, July 17, 1912. (Parenthetical explanation supplied.)

Such report reflects that two things were intended in connection with the new legislation. First, business transactions would be facilitated, and second, the Government would occupy the same position with reference to liens on property as does the individual.

If the Federal tax liens are given priority over the attorney's fee in this case, the effect will be to discourage the making of mortgage loans, contrary to the design of the Section to facilitate business transactions. This will be so because lenders will know from the start that in event of defaults on their loans followed by foreclosure, there is no way they can avoid taking a loss where a substantial Federal tax lien has been filed against the owner of the property. The case at bar is a perfect example of this situation. But for the tax lien Respondents Pioneer American Insurance Company and The Development Company, Inc., both being mortgagees of taxpayers Rogers, could avoid loss by Pioneer American bidding the amount of its out-of-pocket expenses including the attorney's fee, and The Development Company, Inc., bidding that amount plus its own out-of-pocket expense. Under the priorities contended

for by the Government, however, as explained in Footnote 3 on Pages 4 and 5 of Petitioner's Brief, there is no way for The Development Company, Inc., to avoid the loss of approximately one-half of its second mortgage loan. This is so even though the property sold at the foreclosure sale for an amount sufficient to pay the loans of both Respondents, with several thousand dollars left over.

If the Government prevails in its contentions in this case, it means that every company engaged in the business of lending money secured by real estate mortgages will have to take into account as a part of its planning that in any case where a Federal lien is filed against the owner-mortgagor, it will not be able to foreclose in event of default without taking a loss on the transaction to the extent of the fees it pays attorneys to handle the foreclosure.

This prospect of unavoidable loss to mortgagees will affect most real estate loans in the country, because the great majority of states allow recovery by the mortgagee of attorney's fees upon foreclosure. Among the fifty states and the District of Columbia, 45 jurisdictions appear to have statutes or decisions relating to allowance of attorney fees in foreclosure cases, and of these, 39 jurisdictions allow them in some form. Undoubtedly these 39 jurisdictions (not to mention the 6 jurisdictions where no authority was found one way or the other) represent the great majority of real estate mortgages now outstanding and which will be made in the future (Appendix B).

Another serious consequence of the Government's

contentions, if accepted by this Court, would be that a large amount of mortgage debt would be subjected to the possibility of unavoidable loss in event of foreclosure, in order to facilitate collection of a relatively small amount of Federal taxes. As of June 30, 1961, for example, the total amount of mortgage debt outstanding in the United States amounted to $215,200,000,000. Federal Reserve Bulletin, January, 1963, Page 61. On the same date, the amount of unpaid taxpayer accounts with the Internal Revenue Service was $1,023,263,000. The latter figure included accounts on which liens had not been recorded as well as those on which they had been recorded. Necessarily the money amount of accounts on which recorded liens were employed would be substantially less than the aforesaid amount of $1,023,263.000. Internal Revenue Service, United States Treasury Department, 1961 Annual Report for the Fiscal Year Ended June 30, 1961, Page 47.

The importance to the Government of the priority it claims is doubtful because in most foreclosure sales no surplus arises—the first mortgagee buys the property by applying his claim against the bid price. The matter is of great importance to mortgage lenders, however, because a cloud would be cast over practically every real estate mortgage in 39 states or more, in that the mortgagee in any given transaction may be forced into a loss position without any fault on his part and with no way to avoid the loss.

The Government's contentions call for a super priority in behalf of the tax lien, and not a lien for the Government similar to liens in favor of individuals, as

mentioned in House of Representatives Report No. 1018. In none of the proceedings in this case, from the time it was first filed up to the present, has either the Government or the other litigants in the case suggested any set of circumstances under which an individual litigant would have priority over the attorney's fee but not the remainder of the first mortgage debt, as the Government claims for itself. Having permitted taxpayers Rogers to accumulate liability for withholding taxes extending over a period of approximately 18 months (R. 20, 25, 34, 64 and 65), the Government now hopes to effect collection, to the extent of $1,250.00, from the Respondents or one of them, although neither of the Respondents has ever had any liability for these taxes nor in any way been responsible for their nonpayment. This is more than any individual lienor could expect, and contrary to the result sought to be accomplished (as set out above) by passage of the legislation which is now 26 USCA 6323.

VI. THE GOVERNMENT WILL BE UNJUSTLY ENRICHED IF ITS TAX LIEN IS ACCORDED PRIORITY OVER AN ATTORNEY'S FEE SECURED BY A PRIOR RECORDED MORTGAGE.

As stated in the opinion below (R. 76), while there may be no decided case directly in point, the principles of unjust enrichment sustain Pioneer American's claim that its first mortgage lien should apply to the attorney's fee the same as to the remainder of the mortgage debt.

"A person is unjustly enriched if the retention of the benefit would be unjust." Cook v. Sears-Roebuck & Company (1947) 212 Ark 308, 206 SW 2d 20, 22.

Under the related equitable topics of restitution and money received, the Arkansas Supreme Court has held that an action will lie for recovery of money if a person has received money or its equivalent under such circumstances that in equity and good conscience he ought not to retain it. The main principle by which to test the matter is whether in equity and good conscience, and in view of the special facts of the case, one is entitled to retain money as against another. General Contract Purchase Corporation v. Clem (1952) 220 Ark. 863, 251 SW2d 112, 114.

Petitioner has made the point that no fund has been created here in the sense that attorneys do when they recover on a claim for damages. (Page 18 of Petitioner's Brief). This is true, but it is also a fact that a fund has been created in a different sense of transforming real estate into money. In the creation of this cash fund, subordinate lienors have been benefitted, whether or not they have engaged counsel of their own. A basic responsibility of plaintiff's attorney in a case such as this one is to assist the trial Court in supervising the foreclosure proceedings to the end that a purchaser at the foreclosure sale may receive merchantable title. This involves, among other things, searching the title to ascertain all claims against the property; joining all interested parties; seeing to proper service on all

parties; amendment of pleadings as required to bring necessary parties and issues before the Court; preparing the decree which sets out findings and orders affecting all parties; seeing to proper advertisement of the sale; and preparing conveyances and orders to effect transfer of title to the property and confirmation of the sale. These services benefit junior lienors as well as the foreclosing lienor, since any surplus funds result, in part at least, from proper rendition of the services.

Such services benefit subordinate lienors in the same way as fees for receivers, commissioners, trustees, and other officers of the Court. In this case the Government has made no objection to fees for a receiver and a commissioner. (R. 45, 50, 51, 53.) In the Government's Brief in opposition to certiorari in the Bond case, it was stated specifically that the Government made no objection to fees in connection with receivership and sale of the property. Government Brief (Footnote 5, Page 8) in opposition to certiorari, Bond v. United States (1960) 364 US 895, 5 L.Ed. 2d 189, 81 SCt 220.

When the present mortgagor first acquired this mortgage in 1956 (R. 18), taxpayers Rogers were not parties to the transaction. Pioneer American had a contract it had every right and reason to believe would be carried out in full, including a provision that in event of default and foreclosure, a reasonable attorney's fee would be made a part of the debt. Pioneer American had no control over the fact that Ocie A. Rogers and wife acquired the "equity" in the property. (R. 38.) Thereafter taxpayers Rogers defaulted in remitting

withholding taxes. Neither Pioneer American nor other prior lienors had any liability or duty whatever regarding such taxes, but under the Government's theory of this case, $1,250.00 would be taken away from the prior lienors and applied in payment of taxes owed by taxpayers Rogers. The substance of what the Government proposes is that Respondent, The Development Company, Inc., be required to pay taxes owed not by it, but by taxpayers Rogers. In equity and good conscience this should not be permitted.

CONCLUSION

The judgment of the Arkansas Supreme Court should be affirmed.

Respectfully submitted,

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APPENDIX A

Title 26, USCA:

Section 6321. Lien for Taxes.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

Section 6322. Period of Lien.

Unless another date is specifically fixed by law, the lien imposed by Section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time.

Section 6323. Validity Against Mortgagees, Pledgees, Purchasers, and Judgment Creditors.

(a) Invalidity of Lien Without Notice.—Except as otherwise provided in subsection (c), the lien imposed by Section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—

(1) Under State or Territorial Laws.—In the office designated by the law of the State

or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law designated an office within the State or Territory for the filing of such notice; . . .

Arkansas Statutes (1947) Annotated:

51-1002. Lien Attaches When Recorded.—Every mortgage of real estate shall be a lien on the mortgaged property from the time the same is filed in the recorder's office for record, and not before; which filing shall be notice to all persons of the existence of such mortgage.

68-101. Requirements for Negotiability.—An instrument to be negotiable must conform to the following requirements;

(1) It must be in writing and signed by the maker or drawer;

(2) Must coitain an unconditional promise or order to pay a sum certain in money;

. . . .

68-102. Sum Certain—Definition.—The sum payable is a sum certain within the meaning of the Act, although it is to be paid:

(1) With interest; or

. . .

(5) With costs of collection or an attor-

ney's fee, in case payment shall not be made at maturity.

68-910. Attorney's Fee—Provision Enforceable.—A provision in a promissory note for the payment of reasonable attorney's fees, not to exceed ten per cent (10%) of the amount of principal due, plus accrued interest, for services actually rendered in accordance with its terms is enforceable as a contract of indemnity.

APPENDIX B

SUMMARY OF LAWS OF STATES AND THE DISTRICT OF COLUMBIA AS TO ALLOWANCE OF ATTORNEY FEES UPON FORECLOSURE.

The following jurisictions allow attorney's fees in some form. (No effort is made to set forth various limitations which may apply.):

Alabama: Hylton v. Cothey (1932), 225 Ala 605, 144 So 579.

Arizona: Federal Land Bank of Berkely v. Warner (1933), 23 P2d 563, 42 Ariz 201, reversed on other grounds 54 SCt 571, 292 US 53, 78 L.Ed. 1120, 91 ALR 380.

Arkansas: Arkansas Statutes (1947) 68-910.

California: California Codes, Civil Procedure, Section 726.

Colorado: Denver Lumber & Manufacturing Company v. Capitol Life Insurance Company (1934), 96 Colo 21, 39 P2d 1036.

Connecticut: General Statutes of Connecticut (1958) Section 49-7.

Delaware: Delaware Code, Annotated, Title 10 Section 3912.

Florida: Gralyn Laundry v. Virginia Bond & Mortgage Corporation (1935), 121 Fla 312, 163 So 706.

Georgia: Georgia Code, Annotated, Section 20-506.

Idaho: Eagle Rock Corporation v. Idamont Hotel Company (1938), 50 Idaho 413, 85 P2d 242, 252.

Illinois: Phillip v. O'Connell (1947), 331 Ill App 511, 73 N.E.2d 864.

Indiana: Burns Indiana Statutes, Section 19-1918.

Iowa: Iowa Code, Annotated, Section 625.22.

Louisiana: Pugh v. Houseman Roofing Company, Inc. (1928), 165 La 795, 116 So 189.

Maine: Revised Statutes of Maine, Chapter 177 Section 6; Pepperell Trust Company v. Mehlman (1959), 155 Me 318, 154 A2d 161.

Maryland: Brennen v. Plitt (1943), 182 Md 348, 34 A2d 853.

Massachusetts: Leventhal v. Krinsky (1950), 325 Mass 336, 90 NE2d 545, 547, and cases cited at 90 NE2d 547.

Michigan: Michigan Revised Statutes, Section 27A. 2431.

Minnesota: Minnesota Statutes, Annotated, Section 582.01.

Missouri: American Savings Bank v. Sutton (1918), 204 SW 572.

Montana: Revised Codes of Montana, Title 93-8613.

New Mexico: Shortle v. McClosky (1935), 39 N. M. 273, 46 P2d 50.

New Jersey: Bank of Commerce v. Markakus (1956), 22 N.J. 428, 126 A2d 346.

New York: Civil Practice Act, Section 1513 authorizes additional allowances in "difficult and extraordinary" foreclosure actions. If such an allowance is requested, the actual attorney's fee incurred becomes relevant and the facts supporting the claim must be alleged and proved. Sullivan County National Bank v. Hall House Co. (1957), 8 Misc2d 733, 170 NYS 2d 748.

North Dakota: North Dakota Century Code, Annotated, Title 28, Section 26-04.

Oklahoma: Oklahoma Statutes, Annotated, Section 686.

Oregon: Parks v. Smith (1920), 95 Or 300, 186 P 552.

Pennsylvania: Foulke v. Hatfield Fair Grounds Bazaar, Inc. (1961), 196 Pa. Super. 155, 173 A2d 703.

Rhode Island: General Laws of Rhode Island (1956), Section 34-11-22.

South Carolina: Berry v. Caldwell (1922), 121 S.C. 418, 114 SE 405.

South Dakota: South Dakota Code of 1939, Section 33.1802.

Tennessee: Caroline Spruce Company v. Black Mountain R. Co. (1918), 139 Tenn 248, 201 SW 770.

Texas: John Hancock Mutual Life Insurance Company v. Davis (Texas Civ. App. 1942), 163 SW2d 433.

Utah: Jensen v. Lichtenstein (1915), 45 U 320, 145 P 1036.

Vermont: Vermont Statutes, Annotated, Section 4527.

Virginia: Code of Virginia of 1950, Section 55-39.

Washington: Revised Code of Washington, Section 4.84.020.

Wisconsin: Larscheid v. Hashek Manufacturing Company (1910), 142 Wis 172, 125 NW 442.

Wyoming: Wyoming Statutes, Section 34-78.

The following jurisdictions do not permit the recovery of attorney's fees:

Kansas: General Statutes of Kansas (1949), Chapter 67, Section 312.

Kentucky: Rilling v. Thompson (1876), 75 Ky 310, 12 Bush 310.

Nebraska: National Bank of North Bend v. Thompson (1911), 90 Neb 223, 133 NW 199.

North Carolina: General Statutes of North Carolina, Section 25-8; Security Finance Company v. Hendry (1925), 189 NC 549, 177 SE 629.

Ohio: Guzweiler v. Riverview Apartment (1936), 540 A 132, 6 NE2d 587.

West Virginia: Campen Brothers v. Stewart (1928), 106 W.Va. 247, 147 SE 381.

In the following jurisdictions, no authority was found one way or the other concerning allowance of attorney fees upon foreclosure:

Alaska
District of Columbia
Hawaii
Mississippi
Nevada
New Hampshire